JD–12-05
Philadelphia, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

KVAERNER PHILADELPHIA
SHIPYARD, INC.

and Case 4-CA-32182

WILLIAM SMITH, An Individual

Edward J. Bonett, Jr., Esq.,
for the General Counsel.
John B. Langel and *Jason A. Collier, Esqs.*
(Ballard, Spahr, Andrews & Ingersoll, LLP),
of Philadelphia, Pennsylvania, for the Respondent.

DECISION

Statement of the Case

Karl H. Buschmann, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on December 15, 2004. The charge was filed by William Smith, an individual, on June 2, 2003, and the complaint issued on July 27, 2004, alleging that the Respondent, Kvaerner Philadelphia Shipyard, Inc., violated Section 8(a)(1) and (3) of the National Labor Relations Act by discharging its employee, William Smith, because he engaged in concerted protected activities. The Respondent filed an answer to the complaint, admitting certain jurisdictional elements raised in the complaint, and denying that that it had violated the Act, stating that the discharge of the employee had been found justified after a full and fair hearing by an arbitrator.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Company, a Delaware corporation with a facility at the Philadelphia Naval Business Center, 2100 Kitty Hawk Avenue, Philadelphia, Pennsylvania, is engaged in the construction and building of ships. With sales and shipments of goods valued in excess of $50,000 directly from

[1] The General Counsel's Motion to Correct Transcript is granted.

points outside the State of Delaware, the Company is admittedly an employer engaged in commerce within Section 2(2), (6), and (7) of the Act.

The Union, International Brotherhood of Boilermakers, Iron Ship Builders, Forgers & Helpers Local Lodge Number 19, is admittedly a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Facts

The instant controversy arose when William Smith, one of the Respondent's employees, addressed a letter to all employees questioning the Company's payroll deductions for union dues and medical and dental benefits from their paychecks. Instead of directing any inquiries to his Union or to his Employer with his concerns, Smith took it upon himself to involve his coworkers.

The Company and the Union have maintained a bargaining relationship and are bound by a collective-bargaining agreement, effective August 23, 2003, through December 31, 2006 (Jt. Exh. 4). Smith, a member of the Union and a past shop steward, was employed as a bender and machinist at the Philadelphia Shipyard since August 2001. He was discharged on June 2, 2003, for handing out a flyer, addressed to all employees and signed, The Silent Shop Steward. Smith had drafted his letter on June 1, 2003, because, in his words, he "wanted to avoid confrontations, and an answer to [his] question [w]ere they making the payroll deductions properly." He accordingly drafted the following letter (Jt. Exh. 1):

> To All Employees,
>
> Have you looked at your pay stubs for the month of May? There are 3 pay periods in the month of May. If you have medical and dental premiums taken out in addition to union dues, you are owed back money. Union dues, medical and dental are a set amount each month. The company takes it out in 2 payments each month; therefore the third paycheck in May should not have had any deductions for union, medical and dental taken out. Who knows how long this has been happening. There are 2 months each year with 3 pay periods in them, and no deductions other than taxes should come out of the third pay period in these 2 months. Where is the extra money going? In addition to the extra money being taken out of your pocket, this money is probably being put into a bank earning interest. This interest is also due you. When you finally get this money back, as you will, demand that it be put into a separate check. If it is put in with your pay, more taxes will be taken out. This applies to current employees, as well as, employees no longer employed by Kvaerner. This could possibly be an honest mistake, however, it should be rectified.
>
> Sincerely,
>
> Bill Smith
> The Silent Shop Steward

Smith testified that he referred to himself as the silent shop steward, because his co-workers continued to seek his advice on contract issues, even though he had earlier been removed as a shop steward. Smith testified that he distributed the letter to three employees, Tom Dietry, Dan Bennett, and Bill Haigs in the morning on his way to work, and suggested that they provide a copy to their respective shop stewards. He also left copies on the picnic table and handed the letter to Nicholas Gabriele, his shop steward. Gabriele informed Smith that he would take it to Paul Weininger, manager of human resources.

In the afternoon of the same day, Smith was called into the office. His termination papers had already been prepared. Handing him the termination statement and, without any further discussion, Weininger told Smith, he was fired and asked him to sign the papers. The termination statement cited three infractions of company rules: First, "gross misconduct" by illegally impersonating a shop steward and handing out false and misleading information with the obvious intent to stir up the employees, second, "refusal to abide by KPSI rules" by distributing such literature on company time and without authorization from a supervisor, and three, "unauthorized use or disclosure of information" by making false statements regarding information about pay and taxes (Jt. Exh. 5). During that brief meeting in the office, Weininger also expressed his view that Smith handed out his letter with the intent to start negative reactions from his coworkers.

The Union filed a grievance at Smith's behest. By letter of June 13, 2003, the Company informed Smith that his grievance was denied after a third step hearing (Jt. Exh. 6). The Union, contending that Smith acted within his right protected by law, submitted the issue to arbitration. Following a hearing on January 30, 2004, before an arbitrator, a decision issued on April 25, 2004, upholding the Company's actions (Jt. Exh. 3).

The General Counsel, in disagreement with the arbitrator's award, filed the complaint in this case, alleging that the discharge of William Smith for addressing the letter to other employees encouraging them to question the Respondent's payroll deductions violated the Act. This presents the issues, whether the Board should defer to the arbitrator's award.

Analysis

The party opposing the award has the burden to show that deference to an arbitration decision is inappropriate. *Turner Construction Co.,* 339 NLRB 451 (2003). Under well-established law, deference is proper where the arbitration proceeding has been fair and regular, where the parties agreed to be bound, and where the award is not repugnant to the Act, and the unfair labor practice issue has been considered. *Spielberg Mfg*., 112 NLRB 1080 (1955); *Olin Corp.,* 268 NLRB 573 (1984); *Mobil Oil,* 325 NLRB 176 (1997, enfd, 200 F.3d 230 (5th Cir. 1999).

Here, the parties agree that the first two criteria have been met and are not in issue. The General Counsel, however, argues "that the arbitration decision was clearly repugnant to the Act, and that it has met the burden for rejecting deferral." The General Counsel reasoned that the Respondent clearly discharged Smith in retaliation for his protected concerted activity that Smith's conduct was not outside the bounds of protected activity that the arbitrator failed to find protected activity, that he erroneously found that Smith lost the protection of the Act and improperly relied on the manner in which he signed his letter. The Respondent argues that the

arbitrator's award is consistent with NLRB policy and case law, that Smith's conduct in drafting and distributing a defamatory and malicious letter was not protected concerted activity, and that the arbitrator considered the unfair labor practice issue.

Protected concerted activity. The record supports a finding that the employee's distribution of his letter to several coworkers and to his shop steward concerning the Company's payroll deductions constituted concerted activity. The Board has consistently defined concerted activity as encompassing the lone employee who is acting for or on behalf of other workers, or one who has discussed the matter with fellow workers, or one who is acting alone to initiate group action, such as bringing group complaints to management's attention. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); Meyers *Industries (II*), 281 NLRB 882 (1986); *Globe Security Systems*, 301 NLRB 1219 (1991); *Alaska Pulp Corp*., 296 NLRB 1260 (1989), enfd. 944 F.2d 909 (9th Cir. 1991). The letter dealt with the employees' working conditions affecting Smith's co-workers and was intended to correct a perceived error in the employees' payroll deductions for union dues and medical expenses, a matter of mutual concern. The concerted action was protected, because it satisfied the Section 7 requirement that the conduct was intended for mutual aid and protection. *Eastex, Inc.* v. *NLRB*, 437 U.S. 556 (1978); *Liberty Ashes & Rubbish Co.*, 323 NLRB 9 (1997).

Was Smith's conduct so flagrant, egregious, or so abusive that he should loose the protection of the Act? Smith testified that the purpose of his letter was "to find out an answer to [his] question" and "to avoid confrontation." Smith also conceded that he had access to his union steward and to his supervisor to express his concerns. Instead, he passed out the letter, addressed to all employees, to his steward and to several employees. The letter states as a matter of fact that the third check in the month of May "should not have had any deductions for union, medical and dental taken out." It questions "how long this has been happening," and where "is the extra money going?" Smith asserts that "the extra money being taken out of your pocket is probably being put into a bank earning interest." The letter then challenges the employees to "demand that [the money] be put into a separate check" when they finally get the money back. The last sentence theorizes that this "could be an honest mistake, [which] however, should be rectified."(Jt. Exh. 1). Clearly, the letter goes beyond a mere request to clarify the payroll deductions, particularly considering the testimony of Nicholas Gabriele, chief shop steward, who received the letter from Smith early in the morning of June 2, 2003. Gabriele testified that he read the letter, and that he explained to him how the dues were taken out, namely that they were taken out biweekly, not monthly. Nevertheless, Smith told him to take the letter to human resources.

In his testimony, Weininger, manager of human resources, confirmed that he obtained the letter from Gabriele, and that he was aware the letter had been distributed to several employees. According to his interpretation, statements therein accused the Company of stealing, "not only is the Company stealing from their pockets, but…have a secret bank account somewhere earning interest on their money" (Tr. 70). He testified (Tr. 72):

> I interpreted it that he was accusing the company of the same theft for either retired, prior terminated employees, employees who may have resigned, employees who had worked for Kvaerner since its inception.

Weininger also testified that a shop steward later came to his office with several employees expressing their concern about Smith's accusations. Three weeks later, on June 20, 2003, Weininger posted a memorandum and distributed to all production employees an explanation how the deductions were computed, pointing out in particular that the Company correctly based the deductions on 26 pay periods during a year (R. Exh. 1). This was necessary, according to Weininger, because "it caused a great deal of damage to [his] credibility, the credibility of management in general, the credibility of the relationship between management and the union, because this letter could be interpreted as the union having permitted the company to steal from its employees all these years" (Tr. 79). Although the Respondent did not suffer any financial damage as a result of the incident, a credibility issue lasted for a month in Weininger's opinion, because employees were not sure whether their paychecks were accurate.

The Respondent's additional reasons for the discharge, notably those contained in the discharge letter, such as impersonating a shop steward, and distributing literature on company time without a supervisor's authorization, were contradictory and inconsistent with the Respondent's testimony. For example, when asked at the hearing, whether the silent steward reference was a factor in the discharge, Weininger testified that it was not. Weininger also admitted that he stated at the arbitration hearing that it did not matter whether the letter was distributed on company time. In subsequent testimony, he equivocated and added that Smith acted without authorization in posting his letter. I, therefore, conclude that the real reason for the discharge, in Weininger's opinion, was the content the letter that clearly accused the Company of wrongdoing, illegal wrongdoing (Tr. 93).

Such accusations are not new. The distribution of handbills by technicians critical of the employer's service to the community during negotiations for a new contract, were held to be unprotected activity, because the handbills disparaged the product or services of their employer during a critical time. *NLRB v. Electrical Workers (IBEW) Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953). When an employee makes statements on a local television program about her employer which were materially false, but which disparage her employer or its products and services, that employee "exceeds the boundaries of protected activity." *St. Luke's Episcopal-Presbyterian Hospital, Inc. v. NLRB*, 268 F.3d 575 (8th Cir. 2001). Inflammatory remarks are not protected. *American Steel Erectors*, 339 NLRB 1315 (2003). The posting of a sarcastic letter which criticized and ridiculed management for its action designed to improve the morale of the employees, was held to be unprotected, because, in the Court's opinion, the letter was intended to mock the employer rather than serve to protest working conditions. *New River Industries v. NLRB*, 945 F.2d 1290 (4th Cir. 1991). However, employees do not forfeit the protection of the Act, for making false or inaccurate allegations about their employer so long as the statements are not deliberately or maliciously false or made with reckless disregard for their veracity. *KBO, Inc*., 315 NLRB 570 (1994); *Simplex Wire & Cable Co*., 313 NLRB 1311 (1994).

Did Smith make false allegations against his employer with reckless disregard for their veracity? The scenario in this case is analogous to two cases cited by the parties. *United Cable*, 299 NLRB 138 (1990), and *Pincus Brothers*, 237 NLRB 1063 (1978), enfd. denied, 620 F.2d 367 (3d Cir. 1980), like the instant case, involve written statements drafted and disseminated by an employee critical of the employer. In *United Cable*, the employee spoke up at an employee meeting suggesting higher wages. He also posted a letter after the meeting on the bulletin board, challenging the employees to question the veracity of a company official and urging that "they

start putting more money in the employees' pockets." Even though the employee was found to have accused the company of lying, the Board declined to defer to the arbitrator's finding that the employee's conduct was only partially protected. The Board found that his letter was not so flagrant, violent, or extreme as to remove the employee from the protection of the Act. Similarly in *Pincus Brothers*, the Board refused to defer to the arbitration award. There, after a meeting between the company and the union to discuss employees' concerns, the discriminate distributed a handbill, referring to the meeting as a circus, stating that the employees might suffer pay cuts in their "already stinking pay checks." Even though the arbitrator found the leaflet to misrepresent and distort facts relating to employment practices and the company's business practices, the Board found that the handbill constituted protected concerted activity. However, on appeal, the Court disagreed and refused enforcement of the Board's decision for several reasons, namely, that the leaflet contained defamatory material known to be false, that the employee's actions constituted unprotected disloyalty, that the employee intended to interfere with the collective bargaining relationship, and that the employee's conduct may not have been concerted.

Unlike the situation in *Hertz Corp.*, 326 NLRB 1097 (1998), where the employee's deliberate false accusations and reckless disregard for the truth was not protected, Smith honestly believed that he was correct. He did not deliberately misrepresent the facts in making his accusations against the employer. His suppositions about the Respondent's payroll deductions turned out to be false.

In his letter, Smith went further, however, than merely voice his erroneous assumptions. He also queried what the Company was doing with the extra money, and stated that the "extra money being taken out of your pocket…is probably being put into a bank earning interest." Stating that the "interest is also due you," he tells his coworkers, including current and past employees, "when you finally get the money back, as you will, demand that it be put into a separate check." Clearly, his erroneous accusations about the Company's ill-gotten gains was both, unnecessary to his stated purpose and, therefore, inflammatory.

I agree with the Respondent that the statements imply that the Company had been stealing from the paychecks of past and current employee as a result of improper payroll deductions. But I also find the Company's unusually swift and drastic reaction exaggerated. It is clear by now that the silent shop steward reference was of little consequence other than a possible attempt by its author to add a touch of credibility or puffery to the letter. Yet the termination letter dramatized it as an impersonation. Similarly, whether the letter was distributed on company time or without company authorization adds little to the consideration of the fundamental issue in this case. I also find that Weininger's testimony inconsistently and dramatically exaggerated the employees' reactions to the letter.

Without a doubt, the Respondent discharged this employee because he had drafted and distributed the letter and argues that it took the same action involving another employee who had distributed a letter about the Company's use of hazardous materials (GC Exh. 3). In that incident, the accusations against the Company were far more serious. The letter, typed on company stationary, was entitled "The numerous and sudden deaths of coworkers." It blames the deaths of employees on a contaminated work environment. This scenario may show an absence of a discriminatory motive here.

On balance, while I consider Smith's testimony evasive and his actions misguided, the conciliatory last sentence in the letter, that this "could be an honest mistake," persuades me to find the letter to be protected concerted activity.

Deferral to arbitration. In a strongly worded opinion, the arbitrator upheld the discharge (Jt. Exh.3). The arbitrator found, inter alia, that the letter clearly implied "that the Company may be intentionally cheating its current and retired employees," that it was "intended primarily to incite his co-workers," that it can be construed "as defamatory and as an intentional act designed to damage the Company's relationship with its workers," and, significantly, that there "is no merit to the Union's assertion that the grievant was engaged in protected speech or concerted action." The arbitrator also chided the Company for its "hyperbolic characterization" and "exaggerated description of the grievant's denigration of the Company's honesty," but reserved his strongest criticism for Smith, not only for his evasive testimony and his disingenuous explanations, but also for having "irresponsibly denigrated the Company's integrity to the bargaining unit."

The General Counsel takes issue with the arbitrator's award, "because it failed to acknowledge the obvious protected concerted nature of Smith's letter." That alone renders his decision repugnant to the Act, according to the General Counsel. Similar criticism is directed at the arbitrator's finding that the manner of signing the letter as silent shop steward was "engendering potential confusion." The General Counsel assigns additional errors in the arbitrator's decision, none of which, standing alone, would render the award repugnant to the Act. While I agree that the arbitrator should not have relied upon Smith's manner of signing the letter as a factor justifying the discharge, it is also clear that it was not one of the deciding factors. The arbitrator's decision states as follows:

> There is no merit to the Union's assertion that the grievant was engaged in protected speech or concerted action. His action recklessly publishing accusations of dishonesty for other employees to take or see is not protected speech under these circumstances, when the grievant elected to ignore the appropriate and ready available avenues of inquiry and redress, and in no way taken in concert with other employees.

Although he clearly considered the issue, the General Counsel is correct that the arbitrator failed "to find protected concerted activity." Moreover, the arbitrator also applied an improper standard, according to the General Counsel, in determining "when otherwise protected activity loses protection," by finding that the letter "exceeded the bounds of fair comment or personal opinion," because the standard is more stringent than simply fair comment.

However, the arbitrator's standard for finding Smith's activity to have lost protection, was, his "action recklessly publishing accusations of dishonesty," a theme which the arbitrator repeatedly emphasized, as follows: Publishing a screed implicitly accusing the Company of cheating its employees, denigrated the Company's integrity, written accusation clearly implying that the Company may be intentionally cheating its current and past employees, causing appreciably damage to the Company's reputation, publishing unjustified allegations of intentional bad faith, attack on the Company's integrity and trustworthiness, and accusations of financial misconduct.

The arbitrator's finding, that the "grievant's intent was clearly to incite his co-workers," was also not unjustified, for his chief shop steward, Gabriele testified in the present case, that before he handed the letter to management, he had explained to Smith how union dues were taken out, which would suggest that Smith already had a partial answer. Yet Smith insisted that Gabriele proceed anyway with the distribution of the letter.

As already stated, I found Smith's activities to be protected under the Act. Accordingly, I believe that the arbitrator was wrong. But to set aside the arbitration award, it need be more than wrong, it must be "palpably wrong." *Olin Corp*., 268 NLRB 573, 574 (1998). The arbitrator had considered the protected and concerted nature of the controversy, and he rejected it after he was presented with the facts relevant to resolving the unfair labor practice. The "Board has considerable discretion to respect an arbitration award and to decline to exercise its authority over alleged unfair labor practices if to do so will serve fundamental aims of the Act." *Carey v. Westinghouse*, 375 U.S. 261, 271 (1964). An award need not be entirely consistent with Board precedent. Indeed, even if it is only arguably correct and "would be decided differently in a trial de novo," the arbitral result can be sustained. *NLRB v. Pincus Brothers, Inc*., 620 F.2d 367, 374 (3d Cir. 1980); *Wabeek*, 301 NLRB 694 (1991). I cannot find that the arbitration award was palpably wrong or totally unjustified. I, therefore, find that the Board should defer to the arbitrator's award.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Deferral to arbitration is appropriate in this case.

On these findings of fact and conclusions of law, and on the entire record, I issue the following

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C., February 23, 2005.

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Karl H. Buschmann
Administrative Law Judge